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Chad Hudgens v. Prosper INC., and Joshua Christopherson : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

CHAD HUDGENS, an individual, Appellant and Plaintiff, vs. **PROSPER, INC.,** a Utah corporation and **JOSHUA CHRISTOPHERSON,** an individual, Appellees and Defendants.	Case No. 20090391-SC 080400249

APPELLANT'S REPLY MEMORANDUM

Appeal From The Judgment of The Fourth Judicial District Court of Utah County, Honorable Gary D. Stott

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I. HUDGENS' PLEADINGS SATISFY THE INTENT TO INJURE STANDARD SET FORTH IN HELF.

Although it acknowledges that Helf v. Chevron USA, Inc., 203 P.3d 962 (Utah 2009) is controlling, Prosper refuses to acknowledge that both the Complaint and proposed Amended Complaint Hudgens filed satisfy the criteria this Court articulated in that case for alleging the exception to the exclusivity provision of the Utah Worker's Compensation Act, U.C.A. § 34-2-105. Instead, Prosper misstates or mischaracterizes several elements of the Helf decision in an effort to contrive distinctions where none exist.

Perhaps Prosper's most important contrivance is when it argues that this Court's discussion of intent and motivation in Helf, 203 P.3d at 972, is dicta. See Prosper Brief at p. 14. In making this extraordinary assertion, Prosper ignores the clear and unequivocal pronouncements of the Court in that case. For example, the Court stated:

> **[T]he legal definition of intent encompasses more than simply motive . . . . The distinction between intent and motive is particularly important in applying the 'intent to injure' standard because an intentional injury may arise in instances where the employer intentionally placed an employee in harm's way, but the employer's motive was to increase profits – not to inflict injury.**

Helf, 203 P.3d at 972 (emphasis added).

Of course, this is not dicta. It is a central element of the Court's analysis and discussion of the very law at issue in this case. Accordingly, Prosper's efforts to argue that

Hudgens has failed to adequately plead intent to injure, since he alleged that the purpose of the waterboarding exercise was to motivate,[1] must fail. The legal intent to injure as articulated by the Court in Helf does not turn on the allegations of motivation but rather on the allegation that Prosper knew or expected that injury would come from the waterboarding exercise. Helf, 203 P.3d at 972. Hudgens made these very allegations in paragraphs 13 through 17 of his original Complaint and his Amended Complaint. See Verified Complaint, Addendum, Ex. A, R 8 - 11, Proposed Amended Complaint, Addendum, Ex. C, R. 99 -100.

Moreover, the distinction between legal intent and motive was resolved by paragraph 17 of Hudgens' proposed Amended Complaint which reads as follows:

> **Christopherson had a conscious and deliberate intent to injure Hudgens by use of waterboarding. This is so because Christopherson believed that the only way in which the motivational exercise could succeed was to cause Hudgens to experience the panic and suffocation integral to the purpose and functioning of waterboarding. This is why Christopherson directed a team member to hold Hudgens' head in place so that it would not move as he poured water in Hudgens' nose and mouth. This is why Christopherson did not stop pouring water into Hudgens' nose and mouth until the jug was empty even though he saw Hudgens struggling to breathe. In other words, by consciously and deliberately waterboarding Hudgens, Christopherson exhibited a conscious and deliberate intent to cause an injury to Hudgens.**

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[1] See Prosper Brief at p. 14.

Hudgens' proposed Amended Complaint at ¶ 17 (emphasis added), Addendum, Ex. C, R. 99. This pleading clearly satisfies the Helf criteria because it sets forth facts demonstrating Prosper's knowledge and expectation of injury from the waterboarding exercise.

A second contrivance is Prosper's suggestion that in order to state a claim under Helf, Hudgens must demonstrate that Prosper knew specifically what injury Hudgens would suffer from the waterboarding. Thus, Prosper argues, since Hudgens alleged an injury in his pleadings that was different from the "transitory discomfort" he experienced as a result of being waterboarded, Hudgens has failed to satisfy the requirement of Helf that Prosper must have an "actual knowledge of the dangerous condition." See Prosper Brief at pp. 13 - 14. This assertion misstates Helf.

Nothing in Helf requires Hudgens to allege that Prosper knew that a certain kind of injury would result from its conduct. It is sufficient to allege that Prosper "knew or expected injury would be the consequence of [its] actions." Helf, 203 P.3d at 974. Moreover, Hudgens alleged in his Verified Complaint and proposed Amended Complaint that waterboarding "is designed to, among other things, create panic and confusion in the subject by creating the impression in the subject that he is drowning." Verified Complaint at ¶ 15, Addendum, Ex. A, R. 9. Additionally, Christopherson stated at the conclusion of the waterboarding exercise that he wanted the sales team to work as hard at making sales as Hudgens had worked to breathe while he was being waterboarded. Verified Complaint at

¶ 17, Addendum, Ex. A. R. 8. Thus, Christopherson was aware that the waterboarding had produced the expected result – feelings of panic and suffocation in Hudgens. Accordingly, Hudgens has adequately identified the known or expected consequences of Prosper's conduct as Helf requires.

A third contrivance Prosper offers is that because Hudgens "volunteered" for the exercise, there can be no finding of intent to injure. See Prosper Brief at p. 15. This argument completely ignores the express language of both the Verified Complaint and proposed Amended Complaint. In both, Hudgens alleged he volunteered for the exercise before being told what it was and then, more importantly, was forcibly restrained by his co-workers, at Christopherson's direction, while Christopherson emptied a gallon jug of water into Hudgens' nose and mouth. Verified Complaint at ¶¶ 13 - 16, Addendum, Ex. A, R. 9, proposed Amended Complaint at ¶¶ 13 - 16, R. 99 - 100. Prosper's argument is therefore flatly wrong and should be rejected.[2]

Clearly, then, Prosper has failed to properly analyze the applicability of the Helf decision to this case. As a result, it fails to adequately support its claims that Hudgens has failed to satisfy the intent to injure requirement. To the contrary, it is obvious that he has.

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[2] And, of course, it seeks yet again to deprive Hudgens of the inferences to which he is entitled as a matter of law on a motion to dismiss, Helf, 203 P.3d at 965, by making a factual conclusion that is inconsistent with other assertions Hudgens made in his pleadings.

II. HUDGENS HAS ADEQUATELY STATED A CLAIM FOR WRONGFUL TERMINATION.

In arguing that the Trial Court was correct in dismissing Hudgens' claim for wrongful termination, Prosper again misapplies the applicable law regarding the public policy exception to the employment at-will doctrine and ignores several critical points that undermine its arguments generally.

First, Prosper dismisses as "gossamer" the numerous manifestations of Utah public policy on the physical and emotional integrity of Utah citizens, particularly in the work place. See Hudgens' Opening Memorandum at pp. 18 - 19. Instead, it seems to argue that the only public policies that are acceptable are the ones that already exist. However, this case presents an entirely new set of facts that do not fit neatly into previously articulated categories. Obviously, of course, it never seemed necessary before now to have an explicit policy preventing employers from waterboarding their employees. Yet, that is the situation presented to the Court here. In this regard, then, it is significant to recall this Court's analysis of public policy in Hansen v. America Online, Inc., 96 P.3d 950, 953 (Utah 2004) which Prosper again ignores:

> **The analysis of whether the public policy exception applies to a particular legal right or privilege will frequently require a balancing of competing legitimate interests: The interests of the employer to regulate the workplace environment to promote productivity, security and similar lawful objectives and the interests of the employees to maximize access to their statutory and constitutional rights within the**

> **workplace . . . . 'Public policy' is a label we attach to those shared expectations and standards of conduct which have acquired both widespread and deeply held allegiance among the citizens generally.**

(emphasis added). This is the touchstone for determining whether Hudgens has adequately identified a public policy. It is not whether the public policy already exists, as Prosper seems to contend.

Second, Prosper misreads the pleading requirements to make a claim for a public policy exception to the at-will doctrine. Prosper criticizes Hudgens for failing to allege how his conduct brought the public policy he articulates into play as required by Ryan v. Dan's Food Stores, 972 P.2d 395, 404 (Utah 1998). See Prosper Brief at p. 20. However, this Court in Ryan stated that another way to satisfy this requirement "is to determine whether dismissing employees under circumstances involved in plaintiff's dismissal would jeopardize the public policy." Ryan, 972 P.2d at n. 4. Hudgens has satisfied this criteria.

Clearly, for Hudgens to be constructively terminated following an assault on him by his employer jeopardizes the very foundation of the public policy he asserts: Protecting the physical and emotional integrity of Utah citizens, particularly in the workplace. This was alleged in paragraphs 30 - 32 of the proposed Amended Complaint, Addendum, Ex. C, R. 86 - 87. Accordingly, Hudgens has in fact satisfied that element of the pleading criteria under Ryan.

Prosper also argues that Hudgens has failed to properly plead the causal connection between the policy he asserts and his termination. In making this argument, Prosper again ignores this Court's analysis in the Ryan case. There, the Court said "the employee initially need only show that the conduct bringing the policy into place 'was **a** cause of the firing.'" Ryan, 972 P.2d at 404 (emphasis added). The conduct bringing the policy into play in this case, of course, is the waterboarding of Chad Hudgens – **the cause** of Hudgens' constructive termination. Hudgens has satisfied the pleading requirements for an exception to the at-will employment doctrine. His wrongful termination claim should be allowed to proceed.

Finally, Prosper mischaracterizes Hudgens' argument by claiming that he alleges "he was terminated for refusing to commit an unlawful act." Prosper Brief at p. 21. Of course, Hudgens made no such allegation. What Hudgens argued was that **"the unique facts of this case are very much akin to a specific category identified by the Court that involves a 'clear and substantial public policy,' to wit, discharging an employee for refusing to commit an unlawful act.** See Touchard v. La-Z-Boy, Inc., 148 P.3d 945, 948 (Utah 2006)." Opening Memorandum at p. 21 (emphasis added). Hudgens argued that he was constructively discharged for refusing to work in an environment in which his employer behaved in an unlawful manner towards him. Consistent with its practice of avoiding all references to what actually transpired in this case, Prosper ignores this argument. Yet, it

remains a compelling justification for reversing the Trial Court's dismissal of Hudgens' claim for wrongful termination.

III. HUDGENS SHOULD BE ALLOWED TO AMEND HIS COMPLAINT TO FULLY DEVELOP HIS CLAIMS.

A. Prosper Again Ignores The Helf Decision.

Prosper argues that Hudgens should not be allowed to amend his Complaint because the allegations of the Amended Complaint contradict the allegations of his original Complaint. Prosper Brief at pp. 25 - 26. It relies upon Webster v. Sill, 675 P.2d 1170, 1172 - 73 (Utah 1983), a case in which the Utah Supreme Court held that an affidavit from a party that contradicted that party's prior sworn testimony could not create a genuine issue of material fact sufficient to defeat a summary judgment motion. This is not analogous to the situation presented here.

Prosper further argues that Hudgens' original allegations, which it claims are binding on him, fail to overcome the exclusivity provision of the Utah Worker's Compensation Act, U.C.A. § 34A-2-105. These arguments fail for several reasons. First, the allegations in Hudgens' proposed Amended Complaint do not "contradict" the allegations in his original Complaint. Prosper's argument is predicated upon an analysis of the requirement regarding pleading intent to injure that completely ignores this Court's Helf decision. In other words, because Hudgens satisfied the pleading requirements under Helf in both his original Verified

Complaint and proposed Amended Complaint, Prosper's arguments against allowing amendment on the grounds of "contradicting" Hudgens' original allegations fall flat.

Prosper's focus on purported contradictions also enmeshes this Court in making factual determinations about whether allegations in the proposed Amended Complaint really do contradict the allegations in the original Complaint. This is so because the Trial Court did not make any findings supporting its decision to deny Hudgens' motion.[3] It is not appropriate to ask the Court to conduct a factual inquiry on matters that were not decided below. See, e.g., Willey v. Willey, 951 P.2d 226, 230 (Utah 1997) **("It is inappropriate in most instances for an appellate court . . . to assume the task of weighing evidence and making its own findings of fact. The appellate court is entrusted with ensuring legal accuracy and uniformity and should defer to the trial court on factual matters")** (emphasis added).

B. Prosper Completely Ignores New Allegations Supporting a Wrongful Termination Claim.

The Trial Court ruled that Hudgens had not adequately pled an exception to the at-will doctrine. See Ruling at pp. 5 - 6, Addendum, Ex. B, R. 87 - 88. Hudgens' proposed Amended Complaint directly addressed this deficiency by alleging that he was constructively

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[3] Of course, this in itself constitutes an abuse of discretion. Kelley v. Hard Money Funding, Inc., 87 P.3d 734, 746 (Utah App. 2004).

terminated, that a substantial public policy interest in maintaining his physical and emotional integrity at work was violated, that Hudgens' termination jeopardized that policy and that is a causal connection between the policy and Hudgens' termination. See proposed Amended Complaint at ¶¶ 30 - 33, Addendum, Ex. C, R. 96 - 97; Ryan, 972 P.2d at 404.

As discussed above, see pp. 4 - 7, Prosper ignores these allegations choosing instead to focus upon a highly constricted view of the law. In choosing this path, Prosper fails to address one of the central purposes of U. R. Civ. P. 15 for freely allowing amendment of claims: **"The Court's ultimate goal is to have the 'real controversy between the parties presented, the rights determined and the case decided.'"** Savage v. Utah Youth Village, 104 P.3d 1242, 1245 (Utah 2004) (citations omitted) (emphasis added).

Nor does Prosper address the fact that nearly every case it relies on to defeat Hudgens' claims was decided on a full factual record. This point is significant because it indicates a reluctance on the Court's part to simply decide cases involving these employment related issues without the benefit of a factual record. Indeed, in this regard, this Court has held:

> **When a motion to dismiss is made, the trial court should adhere to a policy of being reluctant to turn a party out of court without a trial. A dismissal which does so is a severe measure and such a motion should be granted only when it clearly appears that the party would not be entitled to relief under any state of facts provable in support of its claim. In ruling on such a motion the court should accept as true all material allegations and such reasonable inferences as to proof that properly could be addressed thereunder. Moreover, consistent with the policy of allowing parties**

> **access to the courts to settle controversies, where there is doubt about the foregoing it should be resolved in favor of allowing the party the opportunity of presenting its proof.**

Wells v. Walker Bank & Trust Company, Inc., 590 P.2d 1261, 1263 (Utah 1979).

Hudgens deserves an opportunity to make his case. This Court should reverse the Trial Court's denial of Hudgens' Motion for Leave to Amend his Complaint and should allow Hudgens to file and serve that Amended Complaint.

RESPECTFULLY SUBMITTED this 5th day of February, 2010.

By _____
Sean N. Egan
Attorney for Appellant/Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of February, 2010, a true and correct copy of the foregoing **APPELLANT'S REPLY MEMORANDUM** (along with a searchable CD), was served upon the persons named below, at the address set out below their name, either by mailing postage prepaid, hand-delivery, Federal Express, or by telecopying to them, a true and correct copy of said document.

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By _____